High Court of Justice, Exchequer Division.

DAVEY *v.* SHANNON.

An agreement not to set up a certain business during the joint lives of the parties to the agreement, is an "agreement that is not to be performed within the space of one year from the making thereof," within the meaning of the 4th section of Statute of Frauds.

DEMURRER to part of a statement of defence.

The statement of claim was in the following terms:

1. The plaintiff is an outfitter and tailor, carrying on business in Devonport.

2. In October 1866, the defendant entered into the employment of the plaintiff as a foreman tailor, for a term of three years, on the terms, amongst others, that if he should leave the plaintiff's employment he should not engage in the service of any one carrying on, or himself carry on, the business of a tailor or outfitter within five miles of Devonport aforesaid.

The defendant, on the expiration of the said period of three years, continued in the employment of the plaintiff, on the like terms, except as to the period of employment, until the end of October 1877.

4. About the end of October 1877, the defendant left the plaintiff's employment, and shortly afterwards commenced to carry on business as a tailor and outfitter in Fore street, Devonport, being the same street in which the plaintiff carries on his said business; and he has since continued and still continues to carry on such business at the place aforesaid, contrary to the terms of the said contract; by reason whereof the plaintiff has been, and will be, injured in his said business and deprived of custom and of profits which he would otherwise have obtained.

The plaintiff claimed an injunction and damages.

The 4th paragraph of the statement of defence was as follows: "The defendant says that neither the alleged contract of employment, nor any memorandum or note thereof, was or is in writing signed by the defendant or any other person by him lawfully authorized; and the defendant relies on the statute, commonly known as the Statute of Frauds, as affording a defence to this action, on the ground that the alleged contract was an agreement not to be performed within the space of one year from the making thereof."

To this paragraph the plaintiff demurred.

A. Charles, Q. C., for the defendant.—*Prima facie*, this agreement is to last for the lives of the parties, and therefore it is not to be performed within a year from the making: *Ely* v. *The Positive Government Security Life Assurance Company*, Law Rep. 1 Ex. D. 20; *Dobson* v. *Collis*, 1 H. & N. 81; *Knowlman* v. *Bluett*, Law Rep. 9 Ex. 1; affirmed in the Exchequer Chamber, Law Rep. 9 Ex. 307; *Sweet* v. *Lee*, 3 M. & G. 452; *Roberts* v. *Tucker*, 3 Ex. 632.

Anstie, for the demurrer.—This is not an agreement which need be in writing in order to satisfy the Statute of Frauds. It is an agreement which may possibly be performed within the year, for there is no presumption of the continuance of any life beyond the space of a year. [HAWKINS, J.—If a servant be hired for a term of five years, the death of that servant is an event which may possibly happen within the year, and which would, of course, determine the service.] The case of *Ely* v. *The Positive Government Security Life Insurance Company* is no doubt against the plaintiff, but it stands alone; the cases on the subject were not fully cited on the argument, and in the Court of Appeal, Law Rep. 1 Ex. D. 58, the court expressly refused to decide the case on the ground of the Statute of Frauds. There are many cases in favor of the plaintiff's contention: *Peter* v. *Compton*, Smith's Leading Cases, 7th ed., vol. 1, p. 335; *Fenton* v. *Emblers*, 3 Burr. 1279; *Ridley* v. *Ridley*, 13 W. R. 763; *Wells* v. *Horton*, 4 Bing. 40; *Gilbert* v. *Sykes*, 16 East 150; *Souch* v. *Strawbridge*, 2 C. B. 808; *Murphy* v. *O'Sullivan*, 11 Ir. Jur. N. S. 111; *Farrington* v. *Donohue*, Ir. R. 1 C. L. 675, is distinguishable, inasmuch as the continuance of the arrangement for a longer period than one year was clearly indicated.

A. Charles, Q. C.—This is not a case where any presumption of the continuance of life is necessarily set up; it is merely a question of the intention of the parties. They clearly intended the arrangement to last over a longer period than one year: *Boydell* v. *Drummond*, 11 East 142, is in my favor.

HAWKINS, J.—I am of opinion that the contracts fall within the 4th section of the Statute of Frauds, as agreements "not to be performed within the space of one year from the making thereof." Upon the first contract for three years it is impossible to raise a doubt. The case, however, has been argued as though it rested

upon a new contract of employment for an indefinite period, after the expiration of the three years, and an agreement on the defendant's part never after that employment should cease to set up business as a tailor or outfitter within five miles of Devonport. As thus presented, I have considered the case.

The law upon the subject is now well established. A contract which, according to its terms, is *prima facie* not to be performed within a year, is not the less within the statute because it is made defeasible by a contingency which may occur within that period. Thus a contract of service for two years is none the less within the statute because it is made determinable by the death of either of the parties, or by notice, or by the misconduct of the servant at any period of the service. *Dobson* v. *Collis* is an express authority to this effect. *Roberts* v. *Tucker* is a striking authority in support of the same doctrine. That was an action by a stipendiary curate against the incumbent of a parish, founded upon an alleged promise made by the defendant to the plaintiff "to take all necessary measures for obtaining the payment of an annual grant from the Society for Promoting the Employment of Additional Curates, in each and every year," &c. At the trial before Mr. Justice COLTMAN he nonsuited the plaintiff, upon the ground that the contract fell within the 4th section of the Statute of Frauds. On motion to set aside the nonsuit, Baron PARKE and Baron ALDERSON upheld the ruling, the latter saying, "The case of a defeasible contract, where the contract may be defeated or put an end to within the year, is not for that reason taken out of the operation of the Statute of Frauds." *Sweet* v. *Lee* further illustrates the same now well-recognised proposition. There the contract was for an annuity for life, and the court held it to be within the 4th section, though it might, by the death of the annuitant, be terminated at any time. Upon the same principle, in *Farrington* v. *Donohue*, it was decided that a verbal agreement to maintain a child aged five years until she was able to do for herself, was within the statute, although the child might die within a year, for it was clear that, if she lived, the contract was not to be—that is, could not be—in the contemplation of anybody, performed within that period. The same view was taken by this court in *Ely* v. *The Positive Assurance Company*, where it was held that the engagement of the plaintiff as solicitor to the company during his whole professional life, and so long as the defendants continued a company,

was a contract not to be performed within a year, though it might be determined by the death or resignation of the plaintiff himself, or by his dismissal for his misconduct within that period.

On the other hand, a contract which *prima facie* and from its terms may be performed within a year, however improbable that it will be so, and even though the parties at the time of making it expected its endurance beyond that period, does not fall within the statute, and it is immaterial that the performance of it is, by the natural course of events, delayed for a much longer period. The most familiar illustration of this proposition is the case of a servant hired generally, whose service may be determined by reasonable notice at any time. Such a contract does not fall within the statute, though the service may continue and the contract remain unterminated for many years: *Beeston* v. *Collyer*, 4 Bing. 309. *Fenton* v. *Emblers* well illustrates the law in this respect. That was an action brought by the plaintiff against the executor of a person named May, upon a promise of May, by his last will and testament to give and bequeath to the plaintiff a legacy or annuity of 16*l.* by the year, to be paid and payable to her yearly and every year from the day of the decease of the said May for and during the term of her natural life. It was objected that this agreement was within the 4th section of the Statute of Frauds, and ought to have been in writing, for that it was not to be performed within a year, since a whole year from May's death was to elapse before the annuity would become payable. It was answered, however, that the action was brought for May's not having done what he ought to have done in his lifetime, viz., made his will, which might have been done within the year. Mr. Justice DENISON said: "The statute does not extend to cases where the thing may be performed within the year," and Mr. Justice WILMOT said: "The statute only extends to such promises where, by the express appointment of the party, the thing is not to be performed within a year." See also *Ridley* v. *Ridley*. *Souch* v. *Strawbridge* was an action for the maintenance of a child placed by the defendant in 1842 under the care of the plaintiff, upon an agreement to pay 5*s.* per week, or one guinea per month, until the defendant gave notice, or as long as the defendant should think proper. The child remained with the plaintiff until 1845. The Court of Common Pleas held that the case was not within the statute, for there was no certain time fixed for the duration of the contract, but it was to endure for an indefi-

nite period, subject to be put an end to at any time at the option of the defendant, and that contingency might defeat the contract within a year. Upon the same principle *Knowlman* v. *Bluett* was decided in this court. There the contract was that the plaintiff should take charge of seven illegitimate children, of which the defendant was the father, and that the defendant should give her 300*l.* a year, payable quarterly, to keep them. The court held the case not to be within the statute, for the reason given by Mr. Baron BRAMWELL, namely: that "the sum may be called an annuity, but really the engagement was not binding on either party for any definite space of time," and that the defendant might at the end of any quarter have refused to provide for the maintenance of the children any longer, and in like manner the plaintiff might have declined to take charge of them. The contract might have been performed within the year, though no doubt both parties expected it would last longer. This judgment was appealed against; but the appeal was disposed of upon another ground.

In the case now before us, the contract set out in the statement of claim amounts to an agreement on the defendant's part not to set up the trade of a tailor or outfitter within five miles of Devonport, during the joint lives of himself and the plaintiff. *Prima facie*, therefore, it was not to be performed within a year, and therefore falls within the operation of the 4th section of the Statute of Frauds. My judgment, therefore, is for the defendant.

The inclination of the American courts is quite adverse to the construction of the statute adopted in the foregoing case. With us the phrase a contract "not to be performed," has generally been considered to mean a contract which *cannot*, and not merely one that *may not* be performed within a year; a contract which it will be, and always must be absolutely impossible to perform in that time, and not merely one which both parties expect *may* not be so accomplished; a contract which *must* continue over a year, and not merely one which *may* embrace many years. The fact that it extends through many years before its accomplishment, is not decisive that it is within the statute. The question still is, was it a contract which, at the time of making, clearly could not and must not be performed within that time. It is not that looking backwards, we see that the contract has not been fulfilled in a year, but whether looking forward from the time of making, we could then say it was not *to be* performed.

It is immaterial what is the *maximum* time of possible duration, as expected by the parties, but the question is, what is the *minimum* time, within which it *can be* performed. Is that more than a year? The criterion is not whether the promisor has the right by the terms of the contract, if he chooses, to perform it within many years, but whether the promisee has no right to demand, and can not receive full performance within

one year. In the last case the contract must always be within the statute, in the other it may not be. But all this is elementary.

Perhaps this view is more obvious, when the contract itself contains on its face a clause which shows that it may be performed within a year, although it may continue much longer. Thus, on a contract to labor for a company "for the term of five years, *or so long as A.* shall continue to be the agent of the company," it was held that the statute did not apply, and that the legal effect of the contract was to serve so long as A. should be the agent of the company, not to exceed five years in all. And as possibly A. might not continue more than a year, the contract might be performed within that time; or it might not, but as it might, it could not be called a contract, which *was not* to be performed in that time: *Roberts* v. *Rockbottom Co.*, 7 Met. 46 (1843).

For a similar reason, a contract by R. to print goods for H. at cost, "two years *or* longer, if necessary, until H. shall make $50,000," is not within the statute, since possibly, so far as the terms of the contract indicate, H. *might* make the $50,000 in one year, although most probably he would not: *Hodges* v. *Richmond Man. Co.*, 9 R. I. 482 (1870).

So in *McLees* v. *Hale*, 10 Wend. 428 (1833), the defendant had only agreed with the plaintiff to support a certain child, then about six months old, until it should be five or six years old, "*or* so long as the child should be chargeable to the town of Greenfield," of which the defendant was an overseer; and it was held not within the statute by reason of the contingency, as the child might not continue chargeable to that town for a year, or even a month.

And if this construction be correct, when the contract *upon its face*, contains a clause or condition by which it may be fulfilled within a year, it is argued, why may it not be also true, where a similar condition or clause is implied by law. In the latter, the contract may be said to be as much *legally* performed as in the former.

Thus it was held in *Peters* v. *Westborough*, 19 Pick. 364 (1837), that an oral contract to support a person, then only twelve years old, "until she was eighteen," was not void under the statute, since it would have been fully performed at her death, which might have occurred within a year from the time of making; and that in order to bring a parol agreement within the statute, it must have been expressly stipulated by the parties, or it must appear to have been understood by them, that the agreement was not to be performed within a year, which stipulation or undertaking must be absolute and certain, and not dependent upon any contingency.

Precisely similar are the cases of *Hutchinson* v. *Hutchinson*, 46 Me. 154 (1858); *Wiggins* v. *Kizer*, 6 Ind. 252 (1855); *Dresser* v. *Dresser*, 35 Barb. 573 (1862); *Heath* v. *Heath*, 31 Wis. 223 (1872); *Bull* v. *McCrea*, 8 B. Mon. 422 (1848); *Howard* v. *Burgen*, 4 Dana 137 (1836); *Ellicott* v. *Peterson*, 4 Md. 476 (1853); *Murphy* v. *O'Sullivan*, 11 Irish Jur. N. S. 111 (1866), an excellent case on this subject.

In some of these cases the contract was to support a person "for life;" in others for a stated term of years; but in all it was thought that the death of the party to be supported would terminate all liability under the contract, and so it might be performed within a year; and no distinction was made between the two cases. Whereas, in *Farrington* v. *Donohoe*, 1 Irish C. L. R. 679 (1866), it was said there was a material difference; that the one was within the statute and the other not.

But so long as the legal force of the contract can extend only during the life of some person, although it nominally extends through a period of years, which may be much longer than such life, there seems to be no more reason for considering the contract within the

statute, than if the contract had been expressed to be simply "for the life" of such person; to which all agree the statute does not apply. For such an agreement is similar to a contract to pay money, or leave the promisee a legacy, at the promisor's death; for though that event may not happen for many years, it may occur in one: *Fenton* v. *Emblers*, 3 Burr. 1278; *Kent* v. *Kent*, 62 N. Y. 560; *Riddle* v. *Backus*, 38 Iowa 81; *Frost* v. *Tarr*, 53 Ind. 390; *Jilson* v. *Gilbert*, 26 Wis. 637; *Updike* v. *Ten Broeck*, 32 N. J. L. 105; *Ridley* v. *Ridley*, 34 Beav. 478; *Wells* v. *Horton*, 4 Bing. 40; 12 Moore 176; *Thompson* v. *Gordon*, 3 Strobh. 196.

For somewhat similar reasons a contract "not *hereafter* to engage in the staging or livery-stable business in S.," though unlimited as to time, was held not within the statute, since it would be in force and could continue only until the death of the defendant, and as that might happen within a year from the time of making the contract, it would then be fully performed, and so the statute did not apply: *Lyon* v. *King*, 11 Metc. 411 (1846); *Worthy* v. *Jones*, 11 Gray 168 (1858); *Blanding* v. *Sargent*, 33 N. H. 239 (1856); *Richardson* v. *Pierce*, 7 R. I. 330 (1862); *Hill* v. *Jamieson*, 16 Ind. 125 (1861); *Foster* v. *McO'Blenis*, 18 Mo. 88 (1853); *Blanchard* v. *Weeks*, 34 Vt. 589 (1861). And the same rule applies where the contract is express not to engage in a certain business for the *next five years* after making: *Doyle* v. *Dixon*, 97 Mass. 208 (1867).

These cases are certainly at variance with the views expressed in our principal case. The reason of them all seems to be that the contract may be *fully performed* within a year. It would be fully performed if the death of the party should occur within that time; no duties or obligations would be imposed upon the personal representatives of the promisor, or extend beyond his life, and therefore in a legal sense the contract would be fully performed at his death.

The argument upon which some of these cases have been decided would *seem* to lead to the conclusion, that if A. orally agrees to work for B. for five years, this means five years, if *he lives so long;* and that if he should die within a year, the contract would be fully performed; and therefore that as by an implied contingency it might be performed within a year, it would not be within the statute; and so that A. would be liable to B. for breach of contract if he should refuse to work at all, or leave without good cause after having commenced. This conclusion seems a fair inference from the previous cases, unless the fact that in the latter the contract is positive to do a certain thing for a certain period, and in the other to refrain from doing it, makes a material difference. The argument, briefly stated, is this: A contract to labor for another "for the life" of the promisor is not within the statute. A contract to labor "for five years, *or* for the life of the promisor," is the same. In a contract to labor for another simply "for five years," the law annexes the condition that it is for the promisor's life only, and therefore the result should be the same, as if it had been expressed in the contract itself.

But the principle has never been extended so far; and it seems to be universally agreed or conceded, that a contract to labor for more than a year is within the statute, although there could be no liability upon the personal representatives of the promisor, for damages, if he should die within the time, and so not, in one sense, fulfil his contract. See *Bracegirdle* v. *Heald*, 1 B. & Ald. 727; *Drummond* v. *Burnell*, 13 Wend. 308; *Shute* v. *Dorr*, 5 Wend. 214; *Tuttle* v. *Lovett*, 31 Me. 655; *Kelly* v. *Terrell*, 26 Ga. 551; *Squire* v. *Whipple*, 1 Vt. 69; *Scroggin Blackwell*, 36 Ala. 351; *Emery* v. *Smith*, 46 N. H. 151; *Comes* v. *Lamson*, 16

Conn. 248; *Giraud* v. *Richmond*, 2 C. B. 335; *Snelling* v. *Huntingfield*, 1 C., M. & R. 20; *Nones* v. *Homer*, 2 Hilt. 116; *Amburger* v. *Marvin*, 4 E. D. Smith 393.

The reason is said to be that wherever the death of a person within a year merely *prevents* full performance, the case is within the statute; but if his death would leave the agreement completely performed, and its purpose fully carried out, it is not; for wherever the agreement can not be *completely performed* within a year, the mere fact that it may be *terminated*, or complete performance excused, or rendered impossible by the death of some person within a year, is not sufficient to take the contract out of the statute. The distinction is subtle, but it is real and well-settled.

The difference between the English and the American view seems to be what is the meaning of the word "performed." If by performance is meant, "forming through," carrying it all out, executing it through the whole stipulated period, then a clause or condition by which it might be terminated, rescinded, or revoked by either party within a year, would not save it from the operation of the statute, as was distinctly held in *Dobson* v. *Collis*, 1 H. & N. 81.

If, on the other hand, the party has a legal right, either by an express stipulation in the contract, or by operation of law, to put an end to the contract within a year, and does so, why is not the contract performed? The maximum time of the contract is not completed, to be sure, but the provision for an earlier termination of it, either by contract or by law, is as much a part of the original contract as any other, and therefore the whole contract may be said to be performed, accomplished, completed. In one sense of the word performance, the contract in *Peters* v. *Westborough*, 19 Pick. 364, to support a child "until he was eighteen years old" would not be *performed* if he died at sixteen; that is to say, there was not a complete and full execution of the maximum obligation of the defendant; there was not a full performance in one sense of the word; but any longer or larger performance was excused, made impossible indeed, and therefore, in a legal sense, there might be a full and complete performance. It is not easy to reconcile this case with the English decisions referred to in our principal case; but it has fairly given tone and color to the American law, on this particular point.

It should not be forgotten, however, that a different view has sometimes been taken even in the American courts, and it has here been sometimes held that if the contract is by its terms *prima facie* to run for a term of years, it is within the statute, although it contain a clause by which it may be terminated within a year. The most notable of this class, perhaps, is that of *Packet Co.* v. *Sickles*, 5 Wall. 580 (1866). In this case Sickles agreed to attach a patented fuel contrivance to the Washington Steam Packet Co.'s steamboat, which the com- were to use on their boat "during the continuance of the patent, if the boat should last so long; and pay therefor, weekly, three-fourths of the value of the fuel saved thereby." In fact the patent had, at the sale of the contract, twelve years to run; but nothing was said about that in the contract itself. It was held, that the contract was within the statute, notwithstanding it might not continue more than a year, by reason of the loss of the boat within that time; and the English cases of *Birch* v. *Earl of Liverpool*, 9 B. & C. 891; and *Dobson* v. *Collis*, 1 H. & N. 81, were prinpally relied upon.

In view of the conflicting opinions of eminent tribunals upon this question, it must be confessed the law is in a very unsatisfactory state upon this delicate point. EDMUND H. BENNETT.